APPEAL NO. 93320

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1993). On January 13, and March 16, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) reached maximum medical improvement (MMI) on September 2, 1992, with 5% impairment. Appellant (carrier) asserts that claimant reached MMI on March 18, 1992 with 5% impairment as certified by his treating doctor, which claimant did not dispute within 90 days. Claimant's only response within the time provided by Article 8308-6.41(a) of the 1989 Act was to deny the assertions made by the appeal.

DECISION

Finding that Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) was not properly applied to the facts of the case, we reverse and remand.

Claimant, a night auditor for Hotel, fell on some steps injuring his back on (date of injury). In March 1992, claimant was seeing (Dr. G) as his treating doctor. Dr. G prepared a TWCC form 69 that indicated claimant "has. . .reached maximum medical improvement" on March 18, 1992. That form refers the reader to "see attached report" in item 13, provides no objective findings of impairment in item 14, and lists no specific body part, other than "back" in item 15. The next exhibit in the record is a letter by Dr. G dated March 4, 1992. There are no doctor's notes dated March 18th in the record; with the evidence so limited, a question could have been raised as to whether Dr. G, on March 4th, was giving an anticipated date of MMI. *See* Texas Workers' Compensation Commission Appeal No. 92127, dated May 15, 1992. None of the above questions were raised at the hearing or on appeal.

The issue as announced at the hearing was, "when did the claimant reach maximum medical improvement?" The carrier in opening argument pointed out that the benefit review conference report stated carrier's assertion that claimant had waited past 90 days to contest MMI. Carrier made it clear that it viewed that defense as a "sub-issue" which was before the hearing officer. Carrier litigated the 90 day rule in the hearing. At the time the hearing commenced, Texas Workers' Compensation Commission Appeal No. 92670, dated February 1, 1993, had not been released. That appeal noted that an impairment rating could not be given until the doctor had certified that MMI had been reached and said that Rule 130.5(e) applied to disputes of MMI just as it did to disputes of impairment.

The "disputed issue" page of the benefit review conference report shows that the issue was, "when was MMI reached?", but it also shows that Rule 130.5(e) had been raised by the carrier as germane to that larger issue. The question of the applicability of the 90 day rule found in Rule 130.5(e) was before the contested case hearing and is the focal point of the carrier's appeal.

The hearing officer ruled that MMI was reached as found by the designated doctor. That doctor's report is generally presumed to be correct as to MMI and impairment unless the great weight of the other medical evidence is to the contrary. However, when an issue under Rule 130.5(e) is before the contested case hearing, it must be addressed before consideration is given to the effect of a designated doctor's opinion. In this instance, there are no findings in regard to the 90 day rule, when claimant was notified of the rating, or when he disputed it.

At one point in the record, claimant replied, to a question on direct examination, that he thought he first heard his doctor had said he reached MMI when he received a letter, "I think the end of March, 31st." He later said he called the Commission to verify when he could contest this conclusion and was told 90 days, "and I think it was a week past those 90 days that I called that same day." Later, on cross-examination (we note that both areas of claimant's testimony were highlighted in the record prior to its arrival at the Appeals Panel), claimant answered "yes" to a question stating that it was approximately 97 days "after (Dr. G) had given you that rating. . ." before claimant attempted to dispute it. The Appeals Panel does not view this testimony as indicating when the 90 day rule began to run in this case, without which an opinion of "97" days or "a week past those 90 days" is insufficient to conduct a meaningful review.

In Texas Workers' Compensation Commission Appeal No. 93167, dated April 19, 1993, the Appeals Panel stated that it needed determinations of dates as to when the 90 days started to run and when the claimant disputed the rating in order to review decisions involving the 90 day rule (Rule 130.5(e) of the 1989 Act). Texas Workers' Compensation Commission Appeal No. 93200, dated April 14, 1993, also states that the Appeals Panel looks to when the claimant is notified, or has knowledge of a rating, as the date of inception of the 90 day rule, not the day the doctor may have first recorded it.

The testimony in the record does not answer the above questions. Evidence should be elicited that indicates when notice was given the claimant of the rating or when he actually knew of it. From that point, a finding should state whether the claimant challenged the initial rating/MMI and if he did, whether it was within the 90 day period. If a timely dispute was raised (*see again* Appeal No. 93200), then questions pertaining to the designated doctor and the correct date of MMI should be addressed.

The decision and order are reversed and remanded for the development of evidence and findings as discussed in this opinion. Reconsideration and additional or different findings may be appropriate as determined by the hearing officer. Pending resolution of the remand, a final decision has not been made in this case. A party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which the new decision is received.

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge